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CHARLES ELMO

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1932.

No. 182

PINELLAS ICE AND COLD STORAGE COMPANY,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE.
Respondent.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

PETITIONER'S REPLY BRIEF.

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It is conceded by Respondent that the question of whether the transfer of substantially all of the property of one corporation to another corporation, of itself, constitutes a statutory reorganization is one of great importance in the administration of the law. It is also stated that the question "is one of sufficient general importance to merit review by this Court." Respondent suggests,

however, that there might be another ground upon which the present decision could be sustained and that the Court might be able to dispose of the case without deciding this admittedly important question.

We respectfully call the Court's attention to the fact that this case was decided by the Circuit Court of Appeals of the Fifth Circuit on the ground that the transfer of substantially all of the assets of one corporation to another was not a reorganization. Respondent cites *Cortland Specialty Company* v. *Burnett*, decided July 29, 1932 by the Circuit Court of Appeals for the Second Circuit, and copies the opinion in his brief. It will appear from the reading of that opinion that the underlying basis of the decision was that a transfer of substantially all of the assets of one corporation to another, of itself does not constitute a reorganization. The Court stated (p. 25, Respondent's Brief):

> "If the last clause means that if the transfer of 'substantially all of the properties' of one corporation to another corporation is a reorganization, the position of Cortland is strong, but we do not regard such an interpretation as warranted."

The Court said (p. 27):

> "Each transaction presupposes a continuance of interest on the part of the transferor in the properties transferred."

It is true that the Court went further and stated in the opinion that there must be stock or securities in addition to the cash, and that the promissory notes in that particular case were not securities. The real basis of the decision, as stated, was on the question which is admittedly of the greatest importance and which Respondent admits merits the consideration of this Court.

The *Cortland* case, decided since our petition was filed, has merely added to the confusion and has accentuated the conflict of decisions. As the situation now stands, the Fifth Circuit and the Second Circuit are in conflict with the Eighth Circuit, the Treasury Department, the Bureau of Internal Revenue and the Board of Tax Appeals. In *National Pipe & Foundry Co.* v. *Commissioner,* 19 B. T. A. 242, it was pointed out that the statute provides its own definition of reorganization, and that any outside general definition is of no importance.

We think it fair to say that there is no more important question before the Internal Revenue Bureau today than the question of what constitutes a reorganization, and that the present decision, as well as that in the *Cortland* case, contrary as they are to the rulings of the Bureau, are causing the utmost confusion. We venture to state that it would be a calamity to the Bureau of Internal Revenue if it should be held that the transfer of all of the assets of one corporation to another does not constitute a statutory reorganization. Gains which would have been subject to tax if the Court below is correct, were not taxed by the Bureau and in most instances, the statute of limitations has expired. During the last two and one-half years, which are still open for review by the Bureau of Internal Revenue, such transactions have largely resulted in losses which the taxpayer will be able to deduct but which heretofore the Bureau has not allowed as deductions.

The issue is therefore before us, and we can only repeat that both Respondent and Petitioner feel that the issue "merits review by this Court." It seems almost certain that the question must come to this Court in the near future and it is therefore obviously a great injustice to Petitioner if it should be denied relief.

We think Respondent is in error that this case may properly be decided on another ground. Respondent suggests that in order to come within the provisions of the statute, the consideration for the transfer of the properties must consist of "stock or securities" in addition to the cash; and then, strangely, takes the position that notes secured by first mortgage bonds are not securities. If one were defining securities, probably the first definition and the one most likely to be acquiesced in by everyone, would be notes secured by mortgages, or as in this case, notes secured by first mortgage bonds.

Respondent points out that there was a part payment in cash and that the balance of the consideration was to be paid in cash, and that the notes and bonds were merely to "evidence" the additional amounts due. It should have been added that the notes and bonds not only evidenced but *secured* the additional amount due. What are securities other than something given to secure the payment of money? Every bond, every note, every mortgage, every debenture, is given to evidence an agreement to pay and to secure the payment of money at some future time.

Notes are securities. *First National Bank* v. *United States,* 282 U. S. 142; *G. C. M. 2000.* C. B. VII-2, p. 248 at p. 250.

In *Jennings* v. *Davis,* 31 Conn. 134, 139, the court said:

> "Promissory notes among our people are regarded as 'securities' for money, more or less valuable, indeed, in proportion as the pecuniary ability and credit of the makers of them are more or less reliable."

In *Wagner* v. *Scherer,* 89 N. Y. App. Div. 202, 203; 85 N. Y. S. 894, the court said:

> "But the term 'securities' embraces promissory notes not only in a popular sense but in a legal sense as well."

In *Rosenthal* v. *Brown*, 247 N. Y. 479, 481; 160 N. E. 921, the court said:

> "The word 'securities' in its broadest sense, includes not only bonds and other promises to pay money, but also evidences of property such as corporate stocks."

In *J. S. Lang Engineering Company* v. *Commonwealth*, 231 Mass. 367, 371; 120 N. E. 843, the court said:

> "In its ordinary acceptation the word 'securities' includes bonds, certificates of stock or of deposit, notes, bills of exchange and other evidences of indebtedness or of property, and not mere choses in action."

See, also, *Mitchell* v. *Porter* (Tex. Civ. A.), 194 S. W. 981, 985; *Will of Stark*, 149 Wis. 631, 657; 134 N. W. 389; *Whiteley* v. *Arbogast*, 17 Ohio Dec. 569, 574; *Peaslee* v. *Rounds*, 77 N. H. 544, 546; 94 Atl. 263; *Bank of Commerce* v. *Hart*, 37 Neb. 197, 202; 55 N. W. 631; *Boston Railroad Holding Co.* v. *Commonwealth*, 215 Mass. 493, 496, 497; 102 N. E. 650.

All the dictionaries, including the law dictionaries, commonly define "securities" as including evidences of debt, such as notes. The fact that notes are short term notes does not affect their character as securities was held in *Harriman National Bank* v. *Commissioner of Internal Revenue*, 43 Fed. (2d) 950, 952.

The length of time until the maturity of the security is of no importance. Is there any question that ninety day notes issued by the Treasury Department are securities? If the Bureau and the Treasury Department and the Court of Appeals for the Eighth Circuit, in *Williams* v. *Commissioner*, the Board of Tax Appeals in *National Pipe & Foundry Co.* v. *Commissioner*, 19 B. T. A. 242, are correct that the mere transfer of substantially all of the assets of one corporation to another constitutes a statu-

tory reorganization, there is no requirement of continuity of control or interest in the transferee. In any case, where the consideration consists of notes, bonds or other securities, instead of stock, there is no continuity of control, and in fact, only a limited continuance of interest. If the notes or bonds are paid, the interest ceases, and it can make no possible difference whether the notes are paid in one year or in ten years. When they are paid gain is realized.

The attempted distinction between exchange and sale is wholly fictitious. There is no warrant in the statute for such a distinction. If there is a question at all, it is as to the nature of the consideration received for the transfer of the property. Whether or not a transfer solely for cash followed by immediate distribution is subject to a single tax or a double tax, is an undecided question. But where the consideration for the transfer is partly in cash and partly in securities, the transaction comes within the clear words of the statute.

The purpose of the legislation would be almost entirely defeated by the construction suggested by Respondent. The purpose of the legislation was to avoid oppressive double taxation on reorganizations and on liquidations of corporations where the proceeds of the liquidation were in pursuance of the liquidation distributed to the stockholders. The Treasury Department, in recommending the legislation, and Congress, in enacting the legislation, attempted to impose one tax only, and that upon the stockholders, which was obviously the only fair thing to do. As pointed out in the petition, the reports of the Treasury Department, the reports of the Committees, the Regulations of the Bureau and the Treasury Department, have all expressed this purpose and have so construed the statute.

It is respectfully urged that the Court should review this case and decide this question, which is of tremendous importance to the Bureau of Internal Revenue and to great numbers of citizens. The present case and the *Cortland* case now stand in conflict with *Williams* v. *Commissioner*, 44 Fed. (2d) 467, Circuit Court of Appeals for the Eighth Circuit, contrary to the regulations of the Treasury Department and to the rulings of the Bureau of Internal Revenue, and contrary to the decisions of the Board of Tax Appeals. We do not think that consideration of this question of reorganization can properly or should be avoided by a suggestion that notes secured by mortgage bonds are not securities. We do not think this point should be taken seriously, but if so, it then becomes of an importance equal to the other question in determining what is a statutory reorganization, the statute being the same in the Revenue Act of 1924, the Revenue Act of 1926, the Revenue Act of 1928 and the Revenue Act of 1932.

Respectfully submitted,

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